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No. 506

JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROSSIE LEE HALE, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is reported at 279 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1960. A petition for rehearing was denied on September 27, 1960. The petition for a writ of certiorari was filed on October 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the search warrant under which an illegal distillery was discovered was based upon a sufficient affidavit.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Indiana on three counts charging (1) possession of an unregistered still, (2) unlawfully making mash, and (3) resisting a federal officer engaged in the service of a search warrant by pointing a gun and threatening to shoot the officer. Petitioner was sentenced to imprisonment for a total of four years, one year on counts 1 and 2, and two years on count 3, the sentences to run consecutively. He was also assessed a total of $1,000 in fines and penalties.

The sole question raised is the sufficiency of the affidavit to support the search warrant (R. 21-23) which resulted in the discovery of a distillery in petitioner's house. The affidavit, executed by an investigator of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service, stated that the affiant had reason to believe that on petitioner's farm there was concealed untaxpaid distilled spirits, mash, and an illicit distillery. The farm was described as follows:

> —go to Harrison-Floyd County Line on State Highway 64, Indiana, then proceed about 1.6 miles to a gravel road on left, then turn left on this road and go about 2 10 of a mile to the first lane on right and then go in lane to a white two story frame house, with barns and outbuildings—

The facts tending to establish probable cause were set forth as follows:

> On January 10, 1959, at 7:30 PM, Investigators Guernsey, Kafoglis, Stocking and Rea followed a 1957 Ford Sedan, away from the Hall premises and noted that the car was from Jefferson County, Kentucky and was occupied by three colored individuals and searched it and found therein 400 pounds of sugar. The owner and driver, Mary Peoples stated that she had taken the sugar to the Hall premises to leave it there but Hall told her to take it away as his place was too hot. The investigators then set up surveillance near the Hall premises for 2 hours and all during the time noted the odors of fermenting mash coming directly from the Hall house and buildings.

The sufficiency of the affidavit was upheld on a motion to suppress before trial, on objections to evidence during trial, and on appeal.

ARGUMENT

As the court below held, the affidavit, read as a whole, was sufficient to show probable cause under the standards laid down by this Court in *Jones* v. *United States*, 362 U.S. 257, and *Draper* v. *United States*, 358 U.S. 307. The affidavit was not based solely on the statement of the driver of the automobile containing the sugar that petitioner had told her to take it away because his place was "too hot". The suspicion that such information tended to arouse (that petitioner's premises were being used for an illegal purpose) was confirmed by the personal ob-

servation of the affiant. The affidavit shows that the agent himself detected the odors of fermenting mash coming directly from petitioner's house and buildings. Any distillery on the premises described in the affidavit had to be illegal in view of 26 U.S.C. 5178(a)(1)(B), which provides that no plant for the production of distilled spirits "shall be located in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house." In all, the facts set forth in the affidavit show good reason to believe that petitioner's house was being used to run an illegal distillery.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1960.

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[1] Even if the warrant were vulnerable to attack, the officer serving it was nevertheless engaged in "the performance of his official duties" within the meaning of 18 U.S.C. 111. *See Amaya* v. *United States*, 247 F. 2d 947, 950 (C.A. 9), certiorari denied, 355 U.S. 916; *Arwood* v. *United States*, 134 F. 2d 1007, 1011 (C.A. 6), certiorari denied, 319 U.S. 776. Petitioner's conviction on the third count laid under 18 U.S.C. 111 is therefore not affected by the legality of the warrant.

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